

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MEDICABILITY, LLC, as Assignee of Strategic Solutions Consulting
Group, LLC,

Appellant,

v.

BLUE HILL BUFFALO CONSULTING, LLC, JOHN P. SKUBINSKI,
and MELVIN SLAWIK, JR.,

Appellees.

No. 2D21-2314

December 2, 2022

Appeal from the Circuit Court for Collier County; Lauren L. Brodie,
Judge.

Kelsey L. Hazzard and Todd B. Allen of Lindsay & Allen, PLLC,
Naples, for Appellant.

John I. Silverfield and Ian T. Holmes of Holmes Fraser, PA, Naples,
for Appellees.

ATKINSON, Judge.

Medicability, LLC (Medicability), as assignee of Strategic Solutions Consulting Group, LLC (Strategic Solutions), appeals the trial court's order dismissing its complaint with prejudice. Because we agree with Medicability that the trial court erred by concluding that Medicability's claims were barred by res judicata, we reverse and remand for further proceedings.¹

Medicability is an agent and representative of nonparty Strategic Solutions. In July 2020, Strategic Solutions entered a contract with Blue Hill Buffalo Consulting, LLC, and its officers, John P. Skubinski and Melvin Slawik, Jr., (collectively, Blue Hill) to supply nonparty Cleveland Clinic with personal protective equipment—particularly, nitrile gloves—for the COVID-19 pandemic. Medicability acted as Strategic Solutions' agent in this transaction but was not specifically named in the contract.

In relevant part, the contract between Blue Hill and Strategic Solutions provided that Blue Hill and Strategic Solutions were the "Parties" to the agreement and that "[e]ach Party shall be deemed to

¹ Because we reverse as to Medicability's res judicata argument, we do not reach Medicability's other arguments raised in this appeal.

include any of its subsidiaries, affiliates, officers, directors, employees, agents, representatives and advisors." Blue Hill agreed to sell 38,300 boxes of nitrile gloves for a total of \$536,200 in a one-time sale. The gloves were to be delivered directly to Cleveland Clinic.

Before the contract was executed, Blue Hill allegedly represented to Strategic Solutions and Medicability that Blue Hill was able to fulfill the order and that the gloves were available for delivery. Strategic Solutions allegedly relied upon these representations when it entered the contract. On July 30, 2020, Medicability paid Blue Hill \$536,200 on behalf of Strategic Solutions pursuant to the contract. The delivery was delayed. Blue Hill allegedly represented to Strategic Solutions and Medicability that the gloves were stalled in customs in Los Angeles. Despite its alleged assurances, Blue Hill did not deliver the gloves as it agreed in the contract.

On November 16, 2020, Medicability filed a complaint (2020 complaint) against Blue Hill, alleging claims for negligent representation, unjust enrichment, violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), fraud in the

inducement, and conversion. Blue Hill moved to dismiss the 2020 complaint, arguing that Strategic Solutions was the real party in interest and that Medicability lacked standing to sue because it was not a party to or an intended beneficiary of the transaction upon which its claims were based.

On March 10, 2021, the trial court granted Blue Hill's motion to dismiss the 2020 complaint with prejudice. However, the trial court's order provided that its "ruling does not act to prohibit [Medicability] from bringing any new and different cause(s) of action against [Blue Hill], based on separate and distinct causes of action from those alleged in the Complaint." Medicability did not appeal the final order dismissing the 2020 complaint.

Instead, on April 8, 2021, Medicability filed a new complaint (2021 complaint) in a separate lawsuit against Blue Hill. In its 2021 complaint, Medicability sued Blue Hill as an assignee of Strategic Solutions, alleging claims for breach of contract, fraudulent inducement, and violation of FDUTPA. Blue Hill filed a motion to dismiss the 2021 complaint based on res judicata with a

separate request for judicial notice² of records from Medicability's 2020 lawsuit. Medicability argued that the claims in the 2021 complaint were not barred by res judicata. After a hearing, the trial court dismissed Medicability's 2021 complaint with prejudice. Medicability timely appealed.

An order dismissing a complaint with prejudice is reviewed de novo. *See Toney v. C. Courtney*, 191 So. 3d 505, 507 (Fla. 1st DCA 2016). "At this stage in the proceedings, we are required to accept as true the . . . complaint's well-pleaded factual allegations and to draw all reasonable inferences from the allegations in the appellant's favor." *Id.*

"The doctrine of res judicata provides that a judgment on the merits in an earlier suit bars a later suit on the same cause of action between the same parties or others in privity with those parties." *Provident Funding Assocs., L.P. v. MDTR*, 257 So. 3d 1114, 1117 (Fla. 2d DCA 2018) (citing *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001)). Res judicata bars a subsequent

² Medicability did not object to the trial court taking judicial notice of the records from the 2020 lawsuit during proceedings on Blue Hill's motion to dismiss the 2021 complaint.

lawsuit when the following identities exist in both the original lawsuit and the subsequent lawsuit: "(1) identity of the thing being sued for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality or capacity of the persons for or against whom that claim is made." *Seminole Tribe of Fla. v. State, Dep't of Revenue*, 202 So. 3d 971, 973 (Fla. 1st DCA 2016) (citing *Sena v. Pereira*, 179 So. 3d 433, 435 (Fla. 4th DCA 2015)).³

The parties agree that the first three identities exist between the 2020 and the 2021 lawsuits. Therefore, the only identity at issue here is the identity of the quality or capacity of the persons for or against whom the claim is made (hereinafter, identity of capacity).

In *Ford v. Dania Lumber & Supply Co.*, the supreme court held that the identity of capacity did not exist between the first and

³ Generally, *res judicata* is an affirmative defense that must be raised in the answer and is not grounds for a motion to dismiss unless it is apparent from the fact of the complaint. *Bayview Loan Servicing, LLC v. Brown*, 329 So. 3d 210, 212 (Fla. 2d DCA 2021). Thus, it is usually error for the trial court to take judicial notice of records from other lawsuits in ruling on a motion to dismiss unless, as here, the defendant properly requests judicial notice and the plaintiff stipulates to the trial court taking judicial notice of records from the other lawsuit. *See id.*; *City of Clearwater v. U.S. Steel Corp.*, 469 So. 2d 915, 916 (Fla. 2d DCA 1985).

second lawsuits involving the plaintiff and the defendant. *Ford v. Dania Lumber & Supply Co.*, 7 So. 2d 594, 594–95 (Fla. 1942) (explaining that identity of capacity had not been established because the plaintiff brought his first lawsuit on behalf of the state for abatement of a public nuisance and his second lawsuit in his personal capacity to abate a private nuisance, seeking personal damages). In *Couch Constr. Co. ex rel. Kimmins Corp. v. Fla. Dep't of Transp.*, the court likewise concluded that the identity of capacity did not exist between the first and second lawsuits. *Couch Construction Co. ex rel. Kimmins Corp. v. Florida Department of Transportation*, 537 So. 2d 631, 632 (Fla. 1st DCA 1988). In *Couch*, the plaintiff entered a construction contract with the defendant. *Id.* at 631. In its contract with a subcontractor, the plaintiff agreed to sue the defendant on behalf of the subcontractor for any of its claims against the defendant. *Id.* The defendant breached its contract with the plaintiff, and the plaintiff filed its first lawsuit for breach of contract. *Id.* The plaintiff prevailed at trial. *Id.* The plaintiff then brought a second lawsuit against the defendant on behalf of the subcontractor, claiming that the subcontractor had incurred damages due to the defendant's breach of the contract

between the plaintiff and the defendant. *Id.* The court concluded that there was no identity of capacity between the first and the second lawsuits because the plaintiff brought the first lawsuit to seek redress for its own damages and the second lawsuit to seek redress only for the subcontractor's damages pursuant to the contract between the plaintiff and the subcontractor. *Id.* at 632; *see also Youngblood v. Taylor*, 89 So. 2d 503, 505–06 (Fla. 1956) (concluding that res judicata did not bar subsequent loss of consortium lawsuit by father because the father brought the first lawsuit as next friend of his son, not for his own claims); *Jacksonville Terminal Co. v. Hodge*, 260 So. 2d 521, 523 (Fla. 1st DCA 1972) (concluding that res judicata did not bar a subsequent lawsuit filed by a widow in her capacity as administrator of the decedent's estate because the widow brought the first lawsuit in her individual capacity).

Here, there is no identity of capacity between the plaintiff in the first lawsuit and the plaintiff in the second lawsuit. In the 2020 lawsuit, Medicability sued Blue Hill on its own behalf, seeking its own damages for Blue Hill's alleged negligent misrepresentation, unjust enrichment, violation of FDUTPA, fraudulent inducement,

and conversion. In the subsequent 2021 lawsuit, Medicability sued on behalf of Strategic Solutions—a party to the contract with Blue Hill and assignor of its rights under that contract to Medicability—for damages *that Strategic Solutions had suffered* as a result of Blue Hill's alleged breach of contract, fraudulent inducement, and violation of FDUTPA.

Blue Hill attempts to distinguish *Ford* and *Couch* by arguing that the identity of capacity requires that the plaintiff and the person on whose behalf the plaintiff is bringing the other lawsuit each have an independent right to relief from the defendant. In other words, Blue Hill argues that there is an identity of capacity in this case because Medicability sought the same damages in the first and second lawsuits—the contract price of \$536,200—and if the allegations are proven, Blue Hill would only be liable to *either* Medicability *or* Strategic Solutions for that amount.

However, Blue Hill's argument conflates the identity of capacity with the identity of the thing for which the plaintiff is suing. *Cf. Seminole Tribe of Fla.*, 202 So. 3d at 973 ("Res judicata bars subsequent litigation when there has been a prior judgment on the merits and the following identities are present in the prior and

current litigation: (1) *identity of the thing being sued for*; (2) identity of the cause of action; (3) identity of the parties; and (4) *identity of the quality or capacity of the persons for or against whom that claim is made.*" (emphasis added) (citing *Sena*, 179 So. 3d at 435)).

Although the relief sought by the plaintiffs in *Ford* and *Couch* were different between the respective first lawsuits and second lawsuits in those cases, that is not the reason the appellate courts in those cases concluded that there was no identity of capacity. Rather, the courts concluded that there was no identity of capacity because, although it was the same party bringing both lawsuits, that party sued based on statutory or contractual authority to sue on behalf of another—and, therefore, in a different capacity—in the second lawsuit. See *Ford*, 7 So. 2d at 595 ("One essential element of estoppel by judgment is identity of parties suing in the same capacity. There might be merit in this contention *if suit had been brought in the name of the State* to enforce a purely personal right. We hold that the plea was bad in law." (emphasis added) (citation omitted)); *Couch*, 537 So. 2d at 632 ("Here, it is clear that there is no identity of the quality or capacity of the person for whom the claim is made in this suit and the earlier one brought by [the

plaintiff]. The first suit was brought by [the plaintiff], seeking redress only for its own damages. The second suit was filed pursuant to its contract obligations *for the exclusive benefit of [the subcontractor]*, seeking redress only for [the subcontractor's] damages." (emphasis added)).

For res judicata to bar a subsequent suit, all four identities "must exist." *Holt v. Brown's Repair Serv., Inc.*, 780 So. 2d 180, 181 (Fla. 2d DCA 2001). Presuming for the sake of discussion that Blue Hill had established that the thing Medicability sued for was the same in both lawsuits, this did not, contrary to what Blue Hill's argument on appeal suggests, automatically establish that the identity of capacity existed between the 2020 and 2021 lawsuits.

Blue Hill also argues that res judicata applied in the second suit because Medicability alleged in its 2021 complaint—and admitted at a hearing on the motion to dismiss the 2021 complaint—that the contract between Strategic Solutions and Blue Hill provided that "[e]ach Party shall be deemed to include any of its . . . agents" and that Medicability "[a]t all relevant times, . . . acted as an agent" of Strategic Solutions. In other words, Blue Hill argues that res judicata bars Medicability's second lawsuit because its

2021 complaint implies that Medicability could have standing to bring a lawsuit against Blue Hill for Medicability's own damages even without an assignment from Strategic Solutions. This argument fails for several reasons. Medicability clearly stated in its complaint that it was "bring[ing the 2021] suit in its capacity as Assignee of non-party Strategic Solutions." Even if Blue Hill is correct and Medicability's allegations in the 2021 complaint mean that Medicability was also bringing the second lawsuit in its personal capacity, this manner of bringing the lawsuit was in the alternative to its express statement that it brought the lawsuit in its capacity as an assignee. In the first lawsuit, Blue Hill prevailed in its argument that Medicability was not a party to the contract and thus lacked standing to sue Blue Hill for the alleged breach of contract. Even if Medicability could have won on an alternative argument that under the contract it met the definition of a party by virtue of its status as an agent of Strategic Solutions, the matter of whether they had standing to sue as a party to the contract was resolved against Medicability and in Blue Hill's favor; in other words, Blue Hill prevailed on the issue of whether Medicability brought its first cause of action in a capacity that provided it

standing to sue as a party to the contract. In the subsequent lawsuit that is the subject of this appeal, Medicability sued in another capacity that allowed it to recover based on the contractual rights of an assignor. Thus, it does not matter whether Medicability was or is a party to the contract (and thus would have received a favorable ruling on the standing issue in the first suit had the appropriate argument been raised) because Medicability brought the second lawsuit in its capacity as an assignee.

We reverse the trial court's order dismissing Medicability's 2021 complaint with prejudice and remand for further proceedings consistent with this opinion.

Reversed and remanded.

MORRIS, C.J., and SMITH, J., Concur in result only.

Opinion subject to revision prior to official publication.